ORIGINAL

Supreme Court, U.S.
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NO. 02-8636

IN THE SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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COUNSEL FOR RESPONDENT

QUESTION PRESENTED

As stated by Petitioner:

> WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE STATE OF FLORIDA'S REFUSAL TO APPLY THE RECENTLY INTERPRETED FLORIDA SUPREME COURT DEFINITION REGARDING THE "COMMON POCKET KNIFE" EXCLUSION TO THE WEAPONS STATUTE, IN DIRECT CONTRADICTION WITH THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *FIORE V. WHITE*, 531 U.S. 225 (2001)

Respondent would restate the question as follows:

> WHETHER THE COURT SHOULD REVIEW THE DECISION OF THE FLORIDA SUPREME COURT, WHICH CONCLUDED THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THAT COURT'S 1997 RULING DETERMINING THAT, THE "COMMON POCKET KNIFE EXCEPTION" TO A FLORIDA WEAPONS STATUTE, DID NOT APPLY TO PETITIONER'S 1987 CONVICTION, ALLEGEDLY IN CONTRADICTION WITH *FIORE V. WHITE*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

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v.
STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Florida, by and through the undersigned assistant attorneys general, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Florida Supreme Court in this case.

OPINION BELOW

The opinion of the Florida Supreme Court (App, *infra*, A) is reported at *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002)

JURISDICTION

The Florida Supreme Court rendered its decision on November 21, 2002 and a mandate was entered on December 21, 2002.

Petitioner asserts a deprivation of the rights guaranteed by the Constitution of the United States. Title 28, United States Code, Section 1257(a) and Rule 10.1(c) Rules of the Supreme Court confer certiorari jurisdiction in this Court to review such claims.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent, State of Florida, accepts as accurate Petitioner's statement regarding the applicable provisions of law involved.

STATEMENT OF THE CASE

The relevant facts of the case were described in the Florida Supreme Court's opinion in *Bunkley v. State*, 833 So.2d 739, 740-741 (Fla. 2002).

In the trial transcript, as attached to petitioner's motion for post-conviction relief, the knife in question, which had been admitted into evidence and was "published" to the jury, was described as follows by the arresting police officer:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.

(CR349-50)

Petitioner testified at his trial regarding the nature of the knife:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?
>
> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

The question of whether petitioner's conviction violates due process based upon the decision in *Fiore v. White*, 531 U.S. 225 (2001), was not raised by the parties at any time. Instead, it was "mentioned" for the first time by Justice Pariente of the Florida Supreme Court at the time of oral argument and discussed by the Florida Supreme Court in their written opinion. The majority of the Florida Supreme held that *Fiore* did not apply in the present case. *Bunkley, supra* at 744 fn.12. The majority also held that there was no violation of due process reasoning:

> The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the burglary and weapons statute, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in *L.B.*, which was issued in 1997, was the culmination

> of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with the legislative intent and to rule in harmony with the law at it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority* -- i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Bunkley, supra at 745.

REASONS WHY THE PETITION SHOULD BE DENIED

(1) THE INTERPRETATION OF THE STATE CRIMINAL LAW IN QUESTION WAS AN EVOLUTIONARY REFINEMENT IN THE LAW WHICH DID NOT VIOLATE DUE PROCESS OF LAW AND IS NOT REQUIRED TO BE APPLIED RETROACTIVELY.

In *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) this Court held that it is not the province of federal courts to re-examine state-court determinations on state law questions. Rather, the federal courts are limited to deciding whether a certain conviction violates the Constitution, laws, or treaties of the United States. This Court stated in *Fiore v. White*, 531 U.S. 225, 228-229, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Bunkley was convicted of armed burglary because he had a

pocketknife with a blade length of 2½ to 3 inches in his trousers at the time he broke into a closed, unoccupied Western Sizzlin Restaurant. *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002). In 1987, when Bunkley committed his crime, Florida Statute 810.02(1)(b) (1985) provided that if a defendant is armed with a dangerous weapon at the time of the commission of a burglary he is subject to imprisonment by a term of years not exceeding life.

In 1987, the law did not exempt or exclude from the statute, a pocketknife with a blade four inches in length or less as being a "common pocketknife". Therefore the fact that the pocketknife in question had a blade of less then four inches did not include that knife within the statutory exception to the definition of "weapon" as found in section 790.001(13). In fact, neither the statutes nor case law defined the term "common pocketknife"; rather what was constituted a "common" pocketknife was left to the jury to determine and this did not make the term unconstitutionally vague.

As the Florida Supreme Court pointed out in *L.B. v. State*, 700 So. 2d 370, at 372 (Fla. 1997):

> ...We believe that the term "common pocketknife" as contained in the statute, does provide persons of ordinary intelligence with fair notice as to what constitutes forbidden conduct.
>
> The legislature's failure to define the term "common pocketknife" in section 790.001(13) does not render that term unconstitutionally vague....Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning which the

legislature intended to ascribe to a term. (citation omitted)

To that end, we note that Webster's defines "common" as: "known to the community; occurring or appearing frequently esp. in the ordinary course of events; of, relating to, or typical of the many rather than the few." Webster's defines "pocketknife" as "a knife with a blade folding into the handle to fit it for being carried in the pocket." From these definitions, we can infer that the legislature's intended definition of "common pocketknife" was: "A type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term. We need not be concerned with odd scenarios construing smaller but more expensive knives as "uncommon." As the United States Supreme Court has observed, "[s]uch straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it." *United States v. Powell*, 423 U.S. 87, 93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975)

L.B., supra at 372. (bold emphasis added)

It was only 1997, ten years after petitioner's conviction was final, that the Florida Supreme Court, relying in part on a Florida Attorney General 1951 opinion, concluded that a pocketknife with a blade of four inches in length or less was a "common pocket knife". *L.B. v. State, supra.*[1]

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[1] Prior to that time, the attorney general's opinion, though persuasive, was not binding on the courts. *State v. Family Bank of Hallandale*, 623 So. 2d 474, at 478 (Fla. 1993) ("Although an opinion of the Attorney General is not binding on a court, it is

At the time of the petitioner's conviction in 1987, evidence and testimony produced at the petitioner's 1987 trial indicated that the knife in question was not a "common" pocketknife." The trial transcript, as attached to petitioner's motion for post-conviction relief, reveals that the knife in question, which had been admitted into evidence and was "published" to the jury, was described as follows by the arresting police officer:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.

(CR349-50)

Petitioner testified at his trial regarding the nature of the knife:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?

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entitled to careful consideration and generally should be regarded as highly persuasive. (citation omitted).").

> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

In the instant case, the Florida Supreme Court ruled that that *L.B. v. State, supra*, "was an 'evolutionary refinement' in the law, i.e., it was a conventional change that 'affords new or different guidelines' for the court's in applying the law." *Bunkley, supra* at 745.

Even after the decision in *Bunkley*, Third District Court of Appeal, in *J.D.L.R. v. State*, 701 So. 2d 626 (Fla. 3d DCA 1997) ruled that the fact that a pocketknife has a blade length less that four inches in length does not mean that it is a "common" pocketknife in all cases but that you must consider other characteristics of the knife:

> We agree with the trial judge that J.D.L.R's knife does not fall within the Supreme Court's definition of "common pocketknife"--"a type of knife occurring frequently in the community which has a blade that folds into the handle and can be carried in one's pocket." *Id.* It is, indeed, a "pocketknife", but it is not a "common" pocketknife. As the trial judge pointed out, its distinctive features are not those characteristic of the typical, ordinary, frequently-occurring pocketknife, but rather characteristic of a weapon.

J.D.L.R., id. at 627.

The decision in *Bunkley*, although it is a new interpretation of a state criminal statute, is not entitled to retroactive application because it did not "interpret" or "clarify" the

definition of the term "common pocketknife" as it existed at the time of the petitioner's conviction. As the Florida Supreme Court explained in *State v. Klayman*, 27 Fla. L. Weekly S951 at S952, 835 So. 2d 248 (Fla. Nov. 14, 2002):

> It thus is this clear under *Fiore* that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, **that were decided under the same version (i.e. the clarified version) of applicable law.** Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature.

As the court explained in *Bunkley, supra* at 745:

> ...This Court's decision in *L.B.*, which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority*--i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Furthermore, as explained earlier, even though pocketknife has a blade of length that is less than four inches does not mean that it is a "common" pocketknife but that the jury can consider other characteristics which are not those of an ordinary, frequently-

occurring pocketknife.[2]

The decision in *Bunkley* is strictly a state court determination of a state law question. As the Court of Appeals for the Third Circuit stated in *Fiore v. White*, 149 F.3d 221, 224-225 (C.A.3 (Pa.) 1998), *reversed on other grounds*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001):

> ...[s]tate courts are under no constitutional obligation to apply their own criminal decisions retroactively. *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). Thus, just as the Supreme Court has fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane*, 489 U.S. 288, 304-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles.

Accordingly, this Court should decline to exercise its certiorari jurisdiction in this case because the matter is strictly an issue of interpretation of state law that does not involve any due process violation.

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[2] *See J.D.L.R., supra,* and, as citations from the trial record indicate, there was testimony that the knife in question was not a "common" pocketknife.

(2) THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *FIORE V. WHITE*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) BECAUSE IT WAS NOT A CLARIFICATION OF THE LAW AS TO WHAT CONSTITUTED "COMMON" POCKETKNIFE AT THE DATE OF PETITIONER'S CONVICTION.

There is no conflict between the Florida Supreme Court's opinion in *Bunkley, supra,* and this Court's opinion in *Fiore, supra,* because the cases are clearly distinguishable factually and legally. Fiore was charged with violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. *Fiore*, 531 U.S. at 226. The prosecution conceded that Fiore had a permit, but argued that he had deviated so dramatically from the permit's terms that he nonetheless violated the statute; his convictions were affirmed on appeal and the Pennsylvania Supreme Court declined to review. *Fiore*, 531 U.S. at 227. The state supreme court thereafter reviewed the conviction of Fiore's co-defendant, David Scarpone. As this Court pointed out:

> The Supreme court reversed Scarpone's conviction on the ground that the statute meant what it said: The statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without a permit;* hence, a person who deviated from his permit's terms did not violate the statute.

Fiore, 531 U.S. at 227.

Fiore sought federal habeas corpus relief and the Third Circuit ruled that the state supreme court had announced a new rule of law, inapplicable to Fiore's already final conviction, and that

the state courts were under no federal constitutional obligation to apply their decisions retroactively. This Court granted certiorari to determine whether Fiore's conviction violated due process.

This Court was uncertain whether the Pennsylvania Supreme Court's decision represented a change in state law and asked that court if the interpretation of the state law set forth in the co-defendant's Scarpone's case "state[s] the correct interpretation of the law in Pennsylvania at the date Fiore's conviction became final." *Fiore*, 531 U.S. at 228 (emphasis added). After the state supreme court advised this Court that its decision in Scarpone's case did not announce a new rule of law but "merely clarified the plain language of the statute" and "furnishes the proper statement of the law at the date of Fiore's conviction", *Fiore*, 531 U.S. at 228 (emphasis added), this Court ruled that because Scarpone's case was not new law, Fiore's case presented no issue of retroactivity and the question was simply "whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as interpreted, does not prohibit." *Fiore*, 531 U.S. 228.

This Court then reasoned :

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. (citations omitted). In this case,

> failure to possess a permit is a basic element of the crime of which Fiore was convicted... And the parties agree that the Commonwealth presented no evidence whatsoever to prove that basic element. To the contrary, the Commonwealth, conceding that Fiore did possess a permit...necessarily concedes that it did not prove he failed to possess one.

Fiore, 531 U.S. at 228-229

Fiore was entitled to due process relief because even though the statute in question only forbad operating a hazardous waste facility without a permit, he was convicted even though he had a permit based upon the argument that he had deviated so dramatically from the permit's terms that this constituted a violation of the statute. Because the Pennsylvania Supreme Court ruled that the statute meant what it said, that the statute only made it unlawful to operate a facility without a permit and that one who deviates from the permit's terms is not a person without a permit and hence such a person did not violate the statute, Fiore was denied due process because the state failed to prove that he did not have a permit and yet still convicted him.

In the instant case, the Florida Supreme Court ruled that that *L.B. v. State*, 700 So. 2d 370 (Fla. 1997) "was an 'evolutionary refinement' in the law, i.e., it was a conventional change that 'affords new or different guidelines' for the court's in applying the law." *Bunkley, supra* at 745. The court in *L.B.* was not, to paraphrase the language used by this court in *Fiore*, "clarifying the common pocketknife exception to the plain language

of F.S. 790.0013, Fla. Stat. (1985) as it existed at the time of Bunkley's conviction." See: *State v. Klayman*, 27 Fla. L. Weekly S951, at S952, 835 So. 2d 248 (Fla. Nov. 14, 2002).

Unlike *Fiore* where the state court convicted the defendant without statutory authority, at the time of petitioner's 1987 conviction, **there was no blade length limit determining what constituted a "common" pocketknife**; therefore, finding the petitioner guilty of armed burglary with a knife that had a blade length less than four inches did not result in a conviction without legislative authority. As the court pointed in *Bunkley*, *supra* at 745:

> The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the burglary and weapons statute, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in *L.B.*, which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with the legislative intent and to rule in harmony with the law at it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority* -- i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Even today the fact that the blade of the pocketknife in

question was less than four inches in length does not automatically mean that it must be found to be a "common" pocketknife even after the decision in *L.B.*[3]

Since there is no conflict between the decision of the Florida Supreme Court in *Bunkley* and this Court in *Fiore*, this Court should deny the petition for writ of certiorari.

(3) THE DECISION OF THE FLORIDA SUPREME COURT IN *BUNKLEY* IS NOT OF COMPELLING IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT.

United States Supreme Court Rule 10 provides in pertinent part that, "A petition for writ of certiorari will be granted for only compelling reasons." The former rule read, "A petition for writ of certiorari will be granted only when there are special and important reasons therefore." In interpreting this rule, this Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) has stated that:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations omitted) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is

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[3] The trial transcript, as attached to petitioner's motion for post-conviction relief, reflects that there was testimony indicating that the knife in question, which had been admitted into evidence and was "published" to the jury, was not a "common" pocketknife.

especially true where the issues involved reach constitutional dimensions....

See also Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed.2d 712 (1923) (" ...[i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties").

Since the case for which certiorari review does not affect the public at large or many defendants presently incarcerated or that may be incarcerated in the future for the offense of armed burglary,[4] the case is not of sufficient compelling importance to justify certiorari review.

(4) THE DECISION OF THE FLORIDA SUPREME COURT WAS CORRECT.

The decision of the court in *Bunkley* was correctly decided. The decision of this Court in *Fiore* does not conflict with *Bunkley* because as stated earlier that case is both factually and legally distinguishable.

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[4] The decision in *Bunkley* will not affect many defendants currently incarcerated for armed burglary nor will it effect future defendants charged with armed burglary. As the court noted in *L.B., supra* at 372 "we believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a 'common' pocketknife under any intended definition of that term." Furthermore, as stated earlier, even if the blade length is less than four inches in length does not mean that a pocketknife in question will always be determined to be a "common" pocketknife. *See J.D.L.R. v. State, supra*.

CONCLUSION

For the reasons set forth above herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I, Robert J. Krauss, a member of the Bar of this Court, hereby certify that on this 21ST day of March, 2003, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Clyde T. Bunkley, pro se Petitioner, DOC # 051390, Avon Park Correctional Institution, P.O. Box 1100, Avon Park, FL 33826. I further certify that all parties required to be served have been served.

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AFFIDAVIT OF MAILING OPPOSITION TO CERTIORARI

Robert J. Krauss, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On March 21, 2003, at approximately 4:00 p.m., I deposited at the United States Postal Box, U.S. Regular Mail, a package addressed to the Clerk of the Supreme Court of the United States, postage prepaid, containing one original and ten copies of the brief in opposition to petition for a writ of certiorari in the above entitled case.

ROBERT J. KRAUSS
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COUNSEL FOR RESPONDENT

Sworn & Subscribed before me,

NOTARY PUBLIC, State of Florida

DONNA R. COLLINS
MY COMMISSION # DD 132440
EXPIRES: August 10, 2006
Bonded Thru Notary Public Underwriters

(commission expiration)
Personally known by me ✓
Produced Identification _____
(check one)
Type of Identification Produced: _____